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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/632,491	07/31/2003	David A. Skidmore	2039(EDillon)	4397
30010 7590 12/22/2009				
AUIZVILLE JACKSON, JR. 8652 RIO GRANDE ROAD RICHMOND, VA 23229				
EXAMINER				
DANIELS, MATTHEW J				
ART UNIT		PAPER NUMBER		
1791				
MAIL DATE		DELIVERY MODE		
12/22/2009		PAPER		

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID A. SKIDMORE
and JAMES B. LINK

Appeal 2008-005909
Application 10/632,491
Technology Center 1700

Decided: December 22, 2009

Before ADRIENE LEPIANE HANLON, CHARLES F. WARREN, and
PETER F. KRATZ, *Administrative Patent Judges*.

KRATZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 1-5, 7-20, and 22-24. We have jurisdiction pursuant to 35 U.S.C. § 6.

Appellants' claimed invention is directed to a method of forming a masonry unit having a filler plug effect. Claim 1 is illustrative and reproduced below:

1. A method for forming a masonry unit, said method comprising the steps of:

raising a pallet to a bottom surface of a mold;

inserting a filler plug into the side of the mold between a partition plate and a pallet;

dispensing mix into the mold;

compressing the mix with a shoe; and

responsive to the compressing, forming a filler plug effect in the compressed mix whereby a masonry unit having a filler plug effect is provided.

The Examiner relies on the following prior art references as evidence in rejecting the appealed claims:

Stuckey	1,872,522	Aug. 16, 1932
Rasmussen	2,475,435	Jul. 5, 1949
Wittke	2,532,049	Nov. 28, 1950
Knipper	3,509,250	Apr. 28, 1970
Koyama	3,662,438	May 16, 1972
Whissell	4,802,836	Feb. 7, 1989
Battle	5,358,214	Oct. 25, 1994
LaCroix	6,113,379	Sep. 5, 2000

Claims 1-5 and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Whissell in view of Battle. Claims 7, 8, and 9-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Whissell in

view of Batlle, LaCroix, and Stuckey. Claims 9-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Whissell in view of Batlle, LaCroix, Stuckey, Knipper, Rasmussen, and Wittke. Claim 22 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Whissell in view of Batlle and Koyama. Claim 23 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Whissell in view of Batlle, Knipper, Rasmussen, and Wittke. Claim 24 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Whissell in view of Batlle, LaCroix, Stuckey, and Koyama.

The principal issue before us is:

Have Appellants shown that the Examiner erred by failing to set forth a prima facie case of obviousness with respect to claims 1 and 24, the only independent claims on appeal, and, consequently failed in presenting a prima facie case with respect to all of the dependent claims on appeal?

We answer this question in the affirmative and we reverse the stated obviousness rejections for substantially the reasons set forth by Appellants in the Appeal Brief and Reply Brief.

It is well settled that the burden of establishing a prima facie case of non-patentability resides with the Examiner. *See In re Piasecki*, 745 F.2d 1468, 1472 (Fed. Cir. 1984). Here, the Examiner's reliance on a combination of Whissell and Batlle to underpin all of the stated obviousness rejections is ill-founded. In this regard, the Examiner acknowledges that Whissell does not teach the steps of inserting a filler plug into a side of the mold between a pallet and partition plate (appealed claim 1) or the insertion of multiple filler plugs as required by appealed claim 24 so as to provide a

filler plug effect in the masonry unit(s) formed from the compressed molding mix of Whissell (Ans. 3, 8, and 9).

To make up for this lack of teaching in Whissell with respect to the here-claimed compression molding method, the Examiner turns first to Batlle. According to the Examiner, “Batlle teaches inserting a filler plug into the side of the mold between a partition plate and a pallet (Figs. 1-5) and a filler plug effect in the compressed mix whereby a filler plug effect is provided (Fig. 5 and 2:46-49)” (Ans. 4). The Examiner additionally refers to another section of Batlle and further generally refers to Koyama for an alleged teaching of simultaneous or automated action in rejecting claim 24 but does not explain where Koyama teaches or suggests inserting filler plug(s) in the manner as Appellants’ claimed process requires (Ans. 9; Batlle, col. 3, ll. 35-47; Koyama, Fig. 3).¹

Based on the aforementioned findings and with respect to independent claim 1, the Examiner opines that:

[i]t would have been prima facie obvious to one of ordinary skill in the art at the time of the invention to incorporate the method of Batlle into that of Whissell for the following reasons:

a) Batlle teaches that stripping of the part from a mold causes serious problems since the adherence thereof to the mold itself and to the strips causes stresses to be formed in precastings, causing deterioration thereof, which Batlle’s method resolves.

b) Batlle suggests use in precastings, and Whissell’s concrete blocks are considered to be precastings.

Ans. 4.

¹ Additionally, the Examiner relies on LaCroix and Stuckey in the rejection of independent claim 24 for allegedly teaching or suggesting other features required by that claim, but not the filler plug insertion step.

Furthermore and with regard to independent claim 24, the Examiner relies on similar reasons that would have allegedly led an ordinary skilled artisan into incorporating the method of Battle into Whissell's method and further asserts that a skilled artisan would have incorporated Koyama's method into Whissell's method because of "the obvious benefits of rapid and automated operation" (Ans. 9).

However, the Examiner has not identified where a pallet is described in Battle, much less a step of inserting a filler plug between a pallet and a partition plate (*see generally* Ans.). More particularly, the Examiner has not furnished an adequate explanation as to why one of ordinary skill in the art would have modified the compression molding process of Whissell that employs a moveable pallet 11 or moveable vibrating table 13 as a bottom for mold 7 in forming concrete blocks using compaction shoes 17 based on the disparate teachings of Battle concerning the use of a mold having a fixed bottom 4 having spaced apart fillets 12 attached to the bottom and moveable strips 16 to form a slot in molded precastings while avoiding undesired stresses during mold stripping (*see generally* Ans., Whissell, and Battle).

As explained by Appellants, Battle is not related to a compression molding process as is Whissell and the here-claimed method and would not be suggestive of a modification to Whissell based on the differing problems presented and addressed by Battle with respect to a fixed bottom mold used in a non-compression process (App. Br. 13-15, 23; Reply Br. 2-4). Consequently, the Examiner has not established that the non-compression, fixed-bottom molding method of Battle instructs or suggests to one of ordinary skill in the art a modification of Whissell's method that would have resulted in a process corresponding to the claim 1 method so as to fulfill the

Examiner's burden of presenting a prima facie case of obviousness, as urged by Appellants (*id.*).

Nor has the Examiner convincingly explained how any of the other prior art references as broadly aggregated and conclusively applied in rejecting claim 24 and/or the additional references as applied in rejecting the variously grouped dependent claims make up for the deficiency in supplying an adequate teaching and/or suggestion that would have led an ordinarily skilled artisan to modify the process of Whissell to include the here-claimed filler plug insertion step as part of Whissell's compression molding method.

In this regard, "rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness" being asserted. *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (quoted with approval in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007)). After all, rejections based on § 103(a) must rest on a factual basis with these facts being interpreted without hindsight reconstruction of the invention from the prior art. *See In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967).

On this record, we reverse the Examiner's obviousness rejections of the appealed claims.

REVERSED

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Application 10/632,491

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